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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 570

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

JOHN DAQUINO and SAM DAQUINO,
Defendants-Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, John Daquino and Sam Daquino, respectfully pray that a writ of certiorari issue to review the decision of the Supreme Court of New Jersey, rendered on October 5, 1959, which denied a petition for certification to the Appellate Division of the Superior Court of New Jersey, which affirmed a judgment of the Essex County Court, Criminal Division, affirming the conviction of your petitioners in the Municipal Court of the City of Newark, under R. S. 32:1-146.7, for a violation of R. S. 32:1-146.6(1)(a).

Opinions Below.

The opinion of the Essex County Court is not reported, but is printed in the Record (D7a).*

The opinion of the Appellate Division is reported in 56 N. J. Super. 230, and is also printed in the Record (Ds1a).**

Jurisdiction.

The order of the Supreme Court of New Jersey, denying the petition for certification to the Appellate Division of the Superior Court of New Jersey, is dated October 5, 1959, and is printed in the Appendix hereto.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C. sec. 1257(3).

Question Presented.

Does not the following section of the Port of New York Authority statute, viz., R. S. 32:1-146.6, which provides, in part,

> "(1) No person, unless duly authorized by the Port Authority shall, in or upon any area, platform, stairway, station, waiting room or any other appurtenance of an air or bus terminal, owned or operated by the Port Authority, * * *

---

* Page 7 of the Appendix to your petitioners' brief in the Appellate Division.

** Page 1 of the Supplemental Appendix to the Petition for Certification.

"(a) sell or offer for sale any article of merchandise * * *"

violate the equal-protection clause of the Federal Constitution, in that no norm or standard is provided under which the Port Authority is to grant or withhold authorization of sales at the Newark Airport?

Constitutional and Statutory Provisions Involved.

The equal-protection clause of the Fourteenth Amendment to the Constitution of the United States. No federal statute. The pertinent state statutes are reproduced at this point: first, R. S. 32:1-146.6:

> "The Port of New York Authority (hereinafter called the 'Port Authority') having duly adopted the following rules and regulations, hereinafter set forth in this section, in relation to *peddling*, soliciting of business, entertaining, begging or loitering at, on or in air, bus or marine terminals operated by it within the territorial limits of the State of New Jersey, the penalties and procedures for its enforcement prescribed in section two* shall apply to violations thereof.
>
> "(1) No person, unless duly authorized by the Port Authority shall, in or upon any area, platform, stairway, station, waiting room or any other appurtenance of an air or bus terminal, owned or operated by the Port Authority, or in or upon any area, bulkhead, dock, pier, wharf, warehouse, building structure, shed, waiting room or any other appurtenance of a marine terminal, owned or operated by the Port Authority:

* R. S. 32:1-146.7.

'(a) *sell or offer for sale any article of merchandise;* or

'(b) solicit any business or trade, including the carrying of baggage for hire; the shining of shoes or bootblacking; or

'(c) entertain any persons by singing, dancing or playing any musical instrument; or

'(d) solicit alms.'

"(2) No person, who is unable to give satisfactory explanation of his presence, shall loiter in or about any toilet, area, station, station platform, waiting room or any other appurtenance of an air or bus terminal, owned or operated by the Port Authority, or in or about any toilet area, bulkhead, dock, pier, wharf, warehouse, building, structure, shed, waiting room or any other appurtenance of a marine terminal, owned or operated by the Port Authority." (Italics ours.)

R. S. 32:1-146.7 provides, in part:

"Any violation within the State of these rules and regulations set forth in section one (Section 32:1-146.6) hereof shall be punishable by a fine not exceeding ten dollars ($10.00) or by imprisonment not exceeding thirty days, or both such fine and imprisonment. Such a violation shall be tried in a summary way and shall be within the jurisdiction of and may be brought in the county district court, or any criminal judicial district court, municipal court, or existing police, magistrate's or recorder's court, in the county where the offense was committed. The Rules of the Supreme Court shall govern the practice and procedure in such proceedings. * * *"

Statement of the Case.

The complaint in the municipal court (D1a) was signed by Port Authority Officer Edward J. Sullivan. Therein it was charged (D1a-19 to 30)

> "that on the 28th day of March, A. D., 1958, at the City of Newark, the said defendant(s) did in an area under the jurisdiction of Port of New York Authority, to wit: Newark air service area and Newark Airport proper, did offer for sale and sell food without having been duly authorized by the Port of New York Authority to engage in offering for sale or selling food in said area under the exclusive jurisdiction of the Port of New York Authority in violation of Title 32, Chapter 1, Section 146-6, of the Revised Statutes of the State of New Jersey, Revision of 1951, Approved December 5, 1951, as amended and supplemented."

A warrant issued (D2a), trial was held, the defendants were found guilty and they were fined $10 each. The fine was paid (D2a-23 to 40; D5a-5 to 7). The defendants appealed to the Essex County Court (D6a) where, after a trial de novo (D13a to 39a), the conviction was affirmed (D11a).

At the trial in the Essex County Court, it was stipulated that food products were turned over by the defendants to employees of Newark Air Service for a consideration (D15a-28 to 32).

It was further stipulated that the defendants' truck was parked on an area leased to Newark Air Service by the Port Authority (D15a-36 to 16a-7; 16a-15 to 18, 35 to 37).

It was further stipulated that the hangar at the Newark Air Service "is within the leased property of the Port Authority" (D15a-33 to 36).

The testimony adduced at the trial in the Essex County Court was substantially as follows:

Norman W. Van Nostrand, terminal freight agent of the Port Authority (D18a-39 to 19a-5), testified that, as part of his duties, he handles Port Authority authorizations for the sale of food at Newark Airport and Seaport. Nobody else in the Port Authority handles those (D19a-6 to 10). All the files relating to the permission or authorizations which have been issued in his office are in his custody. He searched through those files. He found no authorization by the Port of New York Authority to John's Catering Service, to one John DaQuino, or to one Sam DaQuino, to sell food at Newark Airport. In the records of his office, there is no such authorization (D19a-11 to 30).

On cross examination, he testified (D19a-35 to 20a-32):

> "Q. In other words, to obtain permission from the Port of New York Authority to sell food in the Newark Airport area, is there any standard procedure or forms or applications to be filled out by any applicant? A. No, sir. It's a matter of negotiation.
>
> . . . . . .
>
> "Q. What must be done? A. Contact our office, and then come in and negotiate it.
>
> "Q. In other words then, there is no standard procedure or standard practice? A. There is no written form of application.

"Q. It's a matter of negotiation with certain officers of the Port of New York Authority. Is that it? A. Yes, sir.

"Q. And if they deem it to the best interests of the Port Authority, they would then grant their permission?

* * * * * *

"A. It would then be subject to negotiations, terms, background of the operator.

"Q. In other words, what I am trying to ascertain, sir, is that the procedure and the practice in each case is not the same for each applicant. Isn't that so? A. I would say it is, approximately the same.

* * * * * *

"Q. Is there any standard preliminary application forms which have to be filled out?

* * * * * *

"A. No."

The defendant, John DaQuino, testified that the defendants' business is rendering service to industry. "We serve coffee. * * * We serve their coffee break" (D23a-22 to 25).

He further testified that the defendants operate trucks under the name of John's Catering Service (D23a-26 to 28).

He further testified that, on March 28, 1958, he had occasion to be in the Newark Airport area. "We serviced their ten-minute coffee break. * * * The personnel of Newark Air Service" (D23a-29 to 40).

He further testified that the Newark Air Service is located at one of the hangars located on the airport (D24a-5, 6); that, in connection with defendants' service, their truck

would be parked right in the doorway of the Newark Air Service hangar (D24a-7 to 10); right at the corner of that particular Newark Air Service hangar; right near their office door (D24a-20 to 23).

He further testified that, on this day, March 28, defendants did not offer for sale any products to the general public. "All we did is service the personnel of Newark Air Service." Defendants gave them coffee, cake "and whatever they wanted." This service would take 10 minutes. Defendants would then "go on our way" (D24a-24 to 36).

He further testified that defendants have been doing this over a year now (D25a-7 to 9).

He further testified (D26a-5 to 13):

> "Q. Mr. DaQuino, do you have a State Veteran's license? A. That's right.
>
> "Q. Do you have it in your possession?
>
> "Mr. Mulhern (attorney for complainant): I will admit that he has a Newark license, • • •.
>
> "The Court: It's stipulated by and between both sides that the man is duly licensed by all authorities, with the exception of the Port Authority."

Raymond Vanlenten, Captain Port Authority Police, Newark Airport (D30a-27, 28) testified that the date of the defendants' arrest was March 28, 1958 (D31a-30 to 34). He further testified (D31a-10 to 23):

> "A. In December, 1956, John's Catering Service Truck was inside the then under construction Newark Air Service hangar. A complaint was made to my office by the authorized vendor, the man who has authority from the Port Authority to sell food on

> the Airport, that John's Catering Service was, in effect, undercutting his business. I took a ride over to the hangar with one of my sergeant(s), and we saw John in the hangar selling food. When he finished and came outside, got in his truck, we stopped him. And at that time, we told him that he was not authorized to sell food at Newark Airport, and that he would have to desist."

The federal constitutional question here involved was first raised in the Statement of Questions Involved in your petitioners' brief, and argued therein, in the Appellate Division of the Superior Court of New Jersey (Db1-10):

> "Does not the statute at bar violate the equal-protection clause of the Federal Constitution, in that no norm or standard is provided under which the Port Authority is to grant or withhold authorization of sales at the Newark Airport? (Not raised below)."

See also Petition for Certification, page 1.

Reasons Relied on for Allowance of the Writ.

(Italics ours unless otherwise indicated.)

The Supreme Court and Appellate Division of the Superior Court of New Jersey have decided a federal constitutional question of substance not heretofore determined by this Court, viz., whether R. S. 32:1-146.6 violates the equal-protection clause of the Federal Constitution, in that no norm or standard is provided under which the Port Authority is to grant or withhold authorization of sales at the Newark Airport.

As we have seen, in December, 1956, a complaint was made to Captain Vanlenten of the Port Authority Police "by the authorized vendor, the man who has authority from the Port Authority" to sell food on the Airport, that John's Catering Service, the defendants' outfit, was, in effect, "undercutting his business" (D31a-10 to 23). Mr. Van Nostrand, terminal freight agent of the Port Authority testified that, as part of his duties, he handles "Port Authority authorization" for the sale of food at Newark Airport (D19a-6 to 10). He admitted, on cross examination, that there is no standard procedure or forms or applications to be filled out by any applicant: that it is a matter of negotiation (D19a-35 to 20a-32).

However, we are not concerned with the *practice* of the Port Authority under the statute, in the matter of such authorizations. The question before this Court is whether the *statute* provides a norm or standard to be followed in choosing whom and whether to authorize. The answer is plainly in the negative. The statute forbids any person to sell anything at any air terminal owned or operated by the Port Authority, "unless duly authorized by the Port Authority." The word "duly" may as well not be there for all the help it provides in guarding against an uncontrolled discretion in the granting of authorization. It begs the question of equal protection. It lends itself to invidious distinctions, depending upon mere will rather than the exercise of a discretion designed to effectuate the indicated legislative policy. See *Duff* v. *Trenton Beverage Co.*, 4 N. J. 595, 609 (1950); *Librizzi* v. *Plunkett*, 126 N. J. L. 17, 21, 22 (S. C. 1940, per Heher, *J.*).

We are here dealing with rights and privileges which, in the aggregate, encompass broad pecuniary scope—what

amounts to a licensing power over a many-faceted area of trade and business. The use of the word "authorized" instead of "licensed" does not diminish the comprehensiveness of the delegated power, a power which, because of the lack of provision of a discernible or validly discriminating standard, is unconstitutional, as capable of being administered partially or unreasonably. See *Steiker* v. *East Patterson*, 137 N. J. L. 653, 655, 656 (E. & A. 1948); *Hoboken* v. *Bauer*, 137 Id. 327 (S. C. 1948, per Burling, *J.*); *Mayor & Council of Hagerstown* v. *Baltimore & O. R. Co.*, 107 Md. 178, 68 A. 490 (1908).

However, in its majority opinion (Ds7a-14 to 9a-25), the Appellate Division says:

> "* * * Thus, an activity of a political governmental unit may be considered as governmental for one or more legal purposes, yet become subject to legal implications in other respects under the influence of a proprietary aspect of its functions or operations, even though the legislature has described the function as governmental. In a sense, this may be said of the factual situation before us here.
>
> "The legislative authorization of the specific functions with which the Port Authority is invested, and their reasonable characterization as governmental in the enabling legislation, undoubtedly would serve to repel any attack upon the validity of such legislatively granted incidents of the activity of the agency as condemnation of land, tax exemption and the like. Yet the nature of an air terminal as an integrated commercial enterprise is so functionally akin to that of a private business operation as to render it reasonable, in the interests of its efficient management, that the agency charged with its maintenance and operation be vested with many of the

incidents of administrative control and direction which would be necessary or desirable were the enterprise under private management. This has been the uniform course of judicial approach to cognate problems in other states. Ex Parte Houston, 93 Okl. Cr. 26, 224 P. 2d 281 (Okl. Cr. App. 1950); Stone *v.* Police Jury of Calcasieu Parish, 226 La. 943, 77 So. 2d 544 (Sup. Ct. 1954); Miami Beach Airline Service, Inc. *v.* Crandon, 159 Fla. 504, 32 So. 2d 153 (Sup. Ct. 1957). See also Ricotta *v.* City of Buffalo, 3 Misc. 2d 625 (Sup. Ct. N. Y. 1954); Hertz Drive-Ur-Self System, Inc. *v.* Tucson Airport Authority, 81 Ariz. 80, 299 P. 2d 1071 (Sup. Ct. 1956). Cf. City of Houston *v.* Jas. K. Dobbs Co. of Dallas, 232 F. 2d 428, 430 (5th Cir. 1936). The general view applicable to airports operated by public agencies is that the agency must be held to have 'all incidental powers * * * necessary to perform such functions in the same efficient manner as would a private person * * *.' Stone *v.* Police Jury of Calcasieu Parish, supra (77 So. 2d, at p. 547). The typically recurrent problem in the cases cited is that of the selection by the operating agency of a *single* firm under contract or license to transport air passengers from the airport to a municipality, and *the exclusion of all competitors* from the airport premises. This kind of managerial prerogative is sustained as reasonably incident to the conduct of an efficient airport operation. In the case last cited a penal ordinance basically like the one before us here, but including limousine and taxi service, was involved, and the court rejected an attack mounted upon the ground of denial of equal protection of the laws—the same, in principle, as that underlying the present challenge.

"The legislatures of New York and New Jersey have envisaged and approved the exercise by the Port Authority of the widest range of managerial

latitude in the field of air terminal operations, providing that the Authority should have 'sole discretion' over 'all details of financing, construction, leasing, charges, rates, tolls, contracts and the operation of air terminals * * * controlled by [it]' and that 'its decision in connection with any and all matters concerning such air terminals shall be controlling and conclusive.' N. J. S. A. 32:1-35.10. It would appear clear that the legislature, in sanctioning the regulation in the Terminal statute here involved, was not purporting to be legislating in the field of licensing of purveyors of food, but in that of the efficient operation of an integrated modern airport enterprise. The relationship between the *absolute* right on the part of the Port Authority management to control or prohibit the admission of food vendors at or on the terminal grounds and facilities, and the safe, orderly and efficient operation of the terminal in all its manifold aspects, is obvious. The smooth and convenient flow and handling of air passengers and the efficient functioning of airport and airline personnel and facilities clearly require close surveillance and full control by the Authority of all concessionaires and vendors of every type in and about the premises, and of their number, identity and disposition in and about the terminal areas. The legal principles concerning norms or standards for the administrative regulation or licensing of businesses, trades or occupations, generally, are totally inapposite. We find the regulation in question and its confirmation by the legislature reasonably necessary to execute a valid governmental object and therefore free of the constitutional infirmity attributed to it."

The difficulty with seeking to derive analogy from the cases cited in the foregoing excerpt is that the Port of New York Authority, as a governmental agency of both the

states of New Jersey and New York, is sui generis. Its status and functions are not at all comparable with those of any municipal or intrastate governmental body, with respect to the proprietary aspects of airport operation.* In *Miller* v. *The Port of New York Authority*, 18 N. J. Misc. 601, 604-05 (S. C. 1939), Ackerson, *S. C. C.*, says:

> "* * * the Authority is a bi-state corporation, created by compact between the two states, * * * financed in large part by funds advanced by the two states and by the Authority's issuance and sale of its bonds. * * * Its projects are operated in behalf of the two states and in the interests of the public * * *. * * * The statutes relating to its projects declare that they are all for the benefit of the people of the two states, * * * and that the Authority shall be regarded as performing a governmental function with reference to said projects and shall be required to pay no taxes or assessments upon any property acquired by it for the purposes of its creation. Furthermore * * * the Authority's surplus revenues are subject to disposition by the states. * * *
>
> "(605) * * * in the case of a public subdivision of a state, the question whether the particular functions exercised are governmental or proprietary is an irrelevant one. For when the question of immunity of a state, considered as a sovereign arises, the nature of the particular activity cannot be inquired into. * * *
>
> "Since, had the undertaking been carried on by one state or the other, either directly, or through an

* For cases holding the operation of a *municipal* airport to be a *governmental* function, see *Erickson* v. *King*, 218 Minn. 98, 15 N. W. 2d 201, 203 (1944); *Abbott* v. *City of Des Moines*, 230 Iowa 494, 298 N. W. 649, 652, 653 (1941); *Imperial Production Corp.* v. *City of Sweetwater*, 210 F. 2d 917, 920 (C. A. Tex. 1954); *Kirksey* v. *City of Fort Smith*, 227 Ark. 630, 300 S. W. 2d 257, 258 (1957). Similarly, as to the New York City Tunnel Authority, see *New York City Tunnel Authority* v. *Consolidated Edison Co. of New York*, 295 N. Y. 467, 68 N. E. 2d 445, 448 (1946).

established state agency, the immunity of sovereignty could be invoked the result must be the same where both states jointly undertake the work by means of a distinct entity acting in behalf of both sovereign states. Plainly the development of the port of New York could not have been adequately dealt with excepting throughout the co-ordinated efforts of New Jersey, New York, and the United States. Of necessity a body external to the two sovereign states had to be created—in no other way could the two act in complete concert—and it is unimportant whether it is denominated a corporation or an authority or a commission."

And in *Port of New York Authority* v. *J. E. Linde Paper Co.*, 205 Misc. 410, 127 N. Y. S. 2d 155, 158-59 (1953), the Municipal Court of the City of New York, Borough of Manhattan says:

"Port Authority is an arm and agency of the States of New York and New Jersey, and in *all* of its activities, is engaged in the performance of essential governmental functions. Bush Terminal Co. *v.* City of New York, 152 Misc. 144, 273 N. Y. S. 331, affirmed 282 N. Y. 306, 26 N. E. 2d 269; Commissioner of Internal Revenue *v.* Shamberg, 2 Cir. 144 F. 2d 998, certiorari denied 323 U. S. 792 * * *; Graves *v.* People of State of New York ex rel. O'Keefe, 306 U. S. 466, 484 * * *; Helvering *v.* Gebhardt, supra (304 U. S. 405, 409, 410); Gaynor *v.* Marohn, 268 N. Y. 417, 424, 425, 198 N. E. 13; People ex rel. Buffalo and Port Erie Public Bridge Authority *v.* Davis, 277 N. Y. 292, 299, 14 N. E. 2d 74, 76; Port of New York Authority *v.* Township of Weehawken, 27 N. J. Super. 328 * * *; Sullivan *v.* Port of New York Authority, 134 N. J. L. 124 * * *; (159) Miller *v.* Port of New York Authority, 18 N. J. Misc. 601, 606, * * *."

"The Port Authority has uniformly been held to be in the position of 'the State' whenever the issue has arisen. For example, its property has been held exempt under the New York Tax Law, * * * as 'property of this state,' Bush Terminal Co. *v.* City of N. Y., supra * * *; interest on its obligations has been held exempt from federal income taxes under Internal Revenue Code, * * * as obligations issued on behalf of the 'state,' Commissioner of Internal Revenue *v.* Shamberg, supra; it has been held to be within the scope of the 'state's' sovereign immunity from suit, Howell *v.* Port of New York Authority, D. C., 34 F. Supp. 797; * * * Harris *v.* Lord Electric Co., Inc. * * * 281 App. Div. 693, 117 N. Y. S. 2d 593; and Miller *v.* Port of New York Authority, supra; and it has been held to be exempt and immune as 'the state' from municipal regulations, Port of New York Authority *v.* Township of Weehawken, supra; see also New Jersey Interstate Bridge & Tunnel Commission *v.* City of Jersey City, 93 N. J. Eq. 550 * * *. As stated by the Court in Port of New York Authority *v.* Township of Weehawken, supra, which only this year held the Port Authority exempt from municipal regulation and reaffirmed the principles by which it is identified with the states creating it * * *:

" 'what must be remembered is that of the joint sovereignty of the two states the Port Authority is but the performing agent, designed to effectuate particular objects within the sphere of a comprehensive plan. The agency, its objects and the plan are those of the States * * *.' "

In its majority opinion, as we have seen (Ds8a-17 to 21), the Appellate Division speaks of

"the selection by the operating agency of a single firm * * * and the exclusion of all competitors from the airport premises."

Here, we do not have any sort of exclusive business arrangement between the Port Authority and any person. In practice, the authorization is a "matter of negotiation" with "any applicant" (D194a-35 to 39). The granting of permission is, in practice, "subject to negotiations, terms, background of the operator" (D20a-15 to 20). "(T)he procedure and the practice in each case is • • • for each applicant • • • approximately the same" (D20a-21 to 24).

The regulation itself, merely provides, negatively, that *no* person *not duly authorized by the Authority* shall sell any merchandise in the designated places. In promulgating that regulation, the Authority failed to provide for equality of opportunity for such selling among *all* persons seeking to be "authorized." The fact that Captain Vanlenten of the Authority Police testified that a complaint was made to his office by "the authorized vendor, the man who has authority from the Port Authority to sell food on the Airport" (D31a-14 to 17), does not *require* the conclusion or even an implication that, under the regulation in question, that man was the only one who could be authorized by the Authority as a food vendor. The Authority itself has sponsored a rule of conduct which does not mention or imply the award of exclusive contracts or arrangements, but deals entirely with a general or universal prohibition against *any* person "not authorized" by such agency. To such a situation the equal protection clause of the Fourteenth Amendment has ideal application.

But, says the majority opinion of the Appellate Division (Ds9a-8 to 13, *supra*):

> • • • • The relationship between the *absolute* right on the part of the Port Authority management

> to control or prohibit the admission of food vendors at or on the terminal grounds and facilities, and the safe, orderly and efficient operation of the terminal in all its manifold aspects, is obvious."

It would be. But the relationship between such a right—not absolute, but limited by a norm or standard—and the safe, orderly and efficient operation of the terminal, is equally obvious. The same can be said as to the relationship between the right of a municipality to control, or even prohibit, food vending on certain streets or public places and the safe, orderly and efficient supervision of activities on such streets and in such places. But once a municipality undertakes regulation, as distinguished from total prohibition, of such activities, it must afford equality of rights and opportunities among those whose activities are regulated. No considerations of orderliness, or efficiency, or even of relative safety, should be permitted to justify arbitrary selection of the beneficiaries of a universally applicable regulation. "In order that an ordinance be not discriminatory, it must be uniform as to all persons; the discretion vested in the authority must not be *absolute*, but limited by regulations, and implemented by a norm or standard therein laid down for guidance in its application to all persons." *Tp. of Raritan* v. *Hubb Motors, Inc.*, 26 N. J. Super. 409, 411 (A. D. 1953). In respect of the constitutional guarantee of equal protection of the laws, there can be no demonstrable distinction thereunder between the detailed nature of municipal administration and that of airport premises. Neither furnishes an excuse for the exercise of absolute, i. e., arbitrary, power.

There was no evidence below showing that the defendants had ever applied to the Port Authority to be authorized to sell merchandise at Newark Airport. That fact does not, however, impair their standing here. One who is prosecuted for disobeying a license ordinance which is void on its face may contest its validity without having sought a permit under it. *Lovell* v. *Griffin*, 303 U. S. 444 (1938). The situation at bar is analogous thereto.

Conclusion.

It is therefore respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court.

FRANK J. CAVICO,
Attorney for Defendants-Petitioners.

SAM WEISS,
Of Counsel.

December 2, 1959.

APPENDIX.

Order Denying Petition.

SUPREME COURT OF NEW JERSEY.

STATE OF NEW JERSEY, Plaintiff-Respondent, *vs.* JOHN DAQUINO, et al., Defendants-Petitioners.	On Petition for Certification. Order Denying Petition.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the fifth day of October, 1959.

JOHN H. GILDEA,
Clerk of the Supreme Court.

A True Copy

JOHN H. GILDEA,
Clerk.

FILED

Oct. 5, 1959

JOHN H. GILDEA
Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 570.

JOHN DAQUINO and SAM DAQUINO,
Petitioners,

vs.

STATE OF NEW JERSEY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

Statement of Question Presented.

Did the State Court decide a Federal question of substance?

Statement of the Case.

As indicated in the Petition for Certiorari (p. 5), defendants John and Sam Daquino were convicted in the Newark Municipal Court and fined $10.00 each for violating R. S. (N. J.) 32:1-146.6, a penal statute of the State of New Jersey. The statute (hereinafter called the Terminal Statute) provides, so far as material, that:

> "(1) No person, unless duly authorized by the Port Authority, shall, in or upon any area, platform, stairway, station, waiting room or any other appurtenance of an air or bus terminal, owned or operated by the Port Authority * * *.
>
> "(a) sell, or offer for sale any article of merchandise; * * *" (Pet. p. 3).

Violations are punishable by fine not exceeding $10.00, imprisonment not exceeding 30 days or both (R. S. (N. J.) 32:1-146.6, 7).

The material evidence and stipulations in the Municipal Court showed that the defendants, without any Port Authority authorization, and despite repeated warnings to desist, had at the date and time set forth in the complaint, sold food and coffee on the apron of a hangar located in the center of the Newark Air Terminal, an air terminal operated by the Port Authority.

There was no evidence that defendants ever had requested permission from the Port Authority to conduct their business at Newark Airport (Pet. p. 19). Defendants' sole constitutional contention on this Petition is that the Terminal Statute is void on its face because of conflict with the equal protection clause (Pet. pp. 2, 3). While in view of this contention, most of the evidence reproduced in the petitioners' Statement of the Case (Pet. pp. 5-9) must be deemed irrelevant, the State has no objection to the Statement with the addition, however, of the following testimony of defendant John Daquino (126a-21 to 27)*:

> "Q. Mr. Daquino, how many times have you been asked to remove your truck and your business from

* Page 26a, Appendix to Defendant's Brief in the Appellate Division.

the vicinity of the Newark Air Service hangar, by The Port of New York Authority, please? A. A couple of times.

Q. A couple of times. How many would you say? A. Two or three. That is all."

As appears in the Petition (Pet. p. 9) the alleged question of the constitutionality of the Terminal Statute was first raised on defendants' appeal to the Appellate Division of the Superior Court, the third hearing of this matter by the New Jersey courts. At the prior trials in the Newark Municipal and Essex County courts, entirely unrelated arguments against conviction had been advanced. (See Opinion of the Essex County Court, in the Record at D7a). In the Appellate Division, the argument was precisely the same as that stated in the second paragraph on page 10 of the Petition for Certiorari. *State* v. *Daquino*, 56 N. J. Super. 230, 235 (1959) (Ds34a)**. Notwithstanding its view that the injection of new issues at so late a stage was "repugnant to the spirit of our practice," the Appellate Division reviewed the Statute to determine whether or not the projected constitutional issue was in fact, involved. It concluded that the Terminal Statute was not a delegation of licensing power and therefore was "free of the constitutional infirmity attributed to it." *State* v. *Daquino, supra*, at p. 240 (Ds39a). There was no dissent. As the Petition for Certiorari indicates (p. 2), when the defendants sought review by the Supreme Court of New Jersey of that conclusion, their Petition for Certification was denied.

** Page 4, Supplemental Appendix to Defendant's Petition for Certification.

ARGUMENT.

1. Certiorari should be denied because the Federal question alleged to have been raised by this Petition is totally without substance.

In the New Jersey court, as here, defendants' claim that they were denied the equal protection of the laws was based entirely on alleged defects on the face of the Terminal Statute. This was the only avenue of attack available to them. Having conceded the absence of evidence that they ever had applied to the Port Authority for permission to sell at Newark Airport (*State* v. *Daquino*, 56 N. J. Super. 230, 235 (1959) (Ds54a)), defendants were confronted with this Court's decisions that one may not complain of arbitrary or discriminatory application of licensing powers to which he has not been subjected. See, e. g., *Lehon* v. *Atlanta*, 242 U. S. 53 (1916); *Grundling* v. *Chicago*, 177 U. S. 183 (1899). Accordingly, they disavowed concern "with the *practice* of the Port Authority under the statute," and, relying on this Court's decision in *Lovell* v. *Griffin*, 303 U. S. 444 (1938) (Pet. 19), based their appeal on the assertion that the Terminal Statute is a licensing statute and that therefore, the absence, in the provision of the statute quoted above (p. 2) of standards to govern the grant of authorization raises an issue under the equal protection clause. (Emphasis defendants'.)

Defendants predicate this argument on the assumption that the Terminal statute is a delegation of regulatory powers. They have cited no Federal case, and we are aware of none, holding that a statute delegating such powers, which neither on its face nor in necessary effect is dis-

criminatory, must contain express provisions against discriminatory administration in order to satisfy the requirements of the equal protection clause. Consequently, defendants' argument that the Terminal Statute is void on its face under the equal protection clause solely because of the omission of standards would appear, at best, no more than a lightly veiled attempt to circumvent this Court's policy against reversing state judgments enforcing state statutes at the behest of a defendant who has himself suffered no deprivation of federally protected rights. *Ley v. New Jersey*, 207 U. S. 67 (1907).

Assuming, however, that the equal protection clause would require the inclusion of administrative standards in a statute which delegated regulatory powers, the principle is completely inapplicable to the Terminal Statute.

The Terminal Statute contains no delegation of powers. It confers no powers whatsoever on The Port of New York Authority, let alone any powers subject to arbitrary or partial administration. It is no more than a simple prohibition of trespass upon terminal property. It is thus comparable to any law penalizing the unauthorized entry on property of another. This is apparent from the background of the legislation as well as from its language. Through bi-state legislation, the States of New York and New Jersey vested The Port of New York Authority with full power to acquire and operate air terminals, including Newark Airport. R. S. (N. J.) 32:1-35.1; *McKinney's Unconsol. Laws of N. Y.* § 6601. The States provided that the Port Authority should have "sole discretion" over "all details of financing, construction, leasing, charges, rates, tolls, contracts and the operation of air terminals • • •

controlled by (it) * * *" R. S. (N. J.) 32:1-35.10; *McKinney's Unconsol. Laws of N. Y.* § 6610; *State* v. *Daquino*, 56 N. J. Super. 230, 239 (1959). Accordingly, and as recited in the opening paragraph of the Terminal Statute (R. S. (N. J.) 32:1-146.6; Pet. p. 3), the Port Authority adopted a regulation warning that unauthorized entry upon the property for various purposes, other than the use of transportation facilities provided for the public thereat, was prohibited. Its power to enact that regulation is nowhere challenged by the defendants. In challenging the Terminal Statute, they attack only the criminal sanctions, enacted by the legislature, against violation of this warning. A challenge to the New Jersey statute, R. S. (N. J.) 23:7-1, punishing trespass upon property "after notice bearing the name of the owner, occupant, lessee or licensee thereof, forbidding the trespass, has been conspicuously posted," would not be distinguishable.

It has never, to our knowledge, been contended that such legislation is susceptible to attack as violating the equal protection clause of the Constitution. By its very nature, this type of legislation applies equally to all persons in the same class, that is persons who enter upon property without the permission of those in legal possession or control. The exception from such a prohibition for persons authorized by owner or occupant to enter upon the property involved is, of course, no more than the necessary definition of the type of conduct prohibited, i. e., unauthorized entry. No further norms or standards are expressed in such a statute because no activity is authorized by the statute to which standards could be applicable or appropriate.

Defendants' allusions, unsupported in a single word of the Statute, to "rights", "privileges" and "licenses", cannot convert the Terminal Statute into a regulatory law. The unwarranted addition of such concepts to a statute in which the legislatures did not even suggest them, cannot create a legitimate question of the statute's validity.

Defendants argue that the exception from the statute's operation of "persons duly authorized by the Port Authority" in itself confers upon the Port Authority "uncontrolled discretion" to grant authorization (Pet. p. 10). The exception, however, neither deals with the manner of authorization nor creates any licensing power. Clearly, should the Authority in the exercise of its powers as operator of the Airport grant to others permission to transact business on Newark Airport premises, it would not, in any sense of the word, be administering this or any other clause of the Terminal Statute. Thus, by no conjecture can this exception be deemed to invalidate the statute on its face.

Properly read, then, the Terminal Statute is seen to create no classification nor confer any powers susceptible of arbitrary or discriminatory operation. It therefore presents no question involving consideration of the equal protection clause of the 14th Amendment.

2. The State Court did not decide a substantial Federal question.

In concluding that the Air Terminal statute was "free of the constitutional infirmity attributed to it", the Appellate Division did not decide a substantial federal question. The court made this clear when it stated, with respect to the statute, that

> "the legal principles concerning norms or standards for the administrative regulation or licensing of businesses, trades or occupations, generally, are totally inapposite." *State* v. *Daquino*, 56 N. J. Super. 230, 240 (1959); Pet. p. 13.

This conclusion by the court was a determination that defendants' attack upon the Terminal Statute was groundless because it was based upon a misapprehension of the nature of the statute. The court rejected defendant's contention that the statute fell within the category of governmental regulations, restrictive of a right to do business, in which the prescription of standards to guide in impartial administration of delegated powers may be appropriate. In so finding, the Court did not interpret or apply the equal protection clause of the United States Constitution. It merely reviewed the statute in the light of the language, the type of activity to which it applied and the obvious purpose of the enactment and concluded that the alleged constitutional issue was founded on a gross distortion of the meaning of the law. As we have already pointed out, no other conclusion was possible in view of the plain meaning and evident purpose of the statute. Thus, the state court decided no question appropriate for review by this Court.

Conclusion.

The defendants' contention that they have been deprived of a constitutional right is based on the incorrect assumptions that the statute under which they were convicted conferred power to license and regulate business and that the State Court viewed it as such. Neither assumption is correct. The necessary correction of their unwarranted assumptions, completely vitiates any assertion that there is a Federal question cognizable by this Court. Accordingly, the Petition for Certiorari should be denied.

Respectfully submitted,

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